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THE ROANOKE RAPIDS CASE

In the Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 28 and 29

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL., RESPONDENTS

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondents' specific statements and arguments, as set forth in their briefs, fall naturally into three categories: (I) those which have already been answered in our main brief, (II) those which require no answer, and (III) those which we shall answer herein.

I. MATTERS ALREADY ANSWERED

In preparing our main brief we have anticipated and replied to most of Respondents' arguments. To avoid repetition we shall not restate our position here. Instead, we are including in an Appendix hereto (pp. 36–39, *infra*) a table of cross-references between Respondents' arguments and our replies thereto in our main brief.

II. MATTERS REQUIRING NO REPLY

A. IMPUTATION OF ARGUMENTS TO PETITIONERS

In our main brief we have had occasion to point out some instances where Respondents, in their briefs in opposition to our petitions for certiorari, imputed arguments to us which we had not made (see main brief, p. 72). They have followed the same practice in their briefs on the merits. We do not think that such assertions should be answered. Respondents may be right in asserting that an argument which we did not make is wrong or even absurd, still that constitutes no reflection on the arguments which we do present.

The following are illustrations of this type of advocacy pursued by Respondents:

1. VEPCO says (p. 18): "There is no basis for the Secretary's argument that the Congressional design was 'modified' as a result of the company's application to the Commission." Of course, no such argument was made by the Secretary. The Secretary stated that such was the argument of

the Commission's Staff, and he quoted from Staff Counsel's own statement, taken from the record (our main brief, pp. 188–9).

2. Respondents, in many instances, refer to the *Secretary's argument* that there was *an implied repeal* of the Commission's licensing power under Section 4 of the Federal Power Act (e.g. VEPCO, p. 54; Comm'n. p. 94). This type of statement is entirely uncalled for in view of the fact that we have expressly and repeatedly stated that we do not contend that there was any repeal or modification of Section 4 of the Federal Power Act, but that, by various statutes, Congress has withdrawn various sites from the licensing authority of the Commission (see pp. 165–168 of our main brief).

3. Appalachian states (p. 13) that the question at issue is whether the 1944 Act represents a *pro tanto* withdrawal or repeal by implication of the board grant of authority in the Federal Power Act. Since Respondents do not assert that there has been such *pro tanto* withdrawal or repeal, and Petitioners do not so maintain, this question is not at issue (see also Carolina, p. 20).

4. Appalachian maintains that "petitioners must sustain a heavy burden to support their interpretation that Congress intended such repeal by implication" (p. 15). Since Petitioners have not urged such an interpretation, no such burden rests upon them.

5. The Commission again states that the Secretary "seeks to have imputed to him" the

responsibility which was vested in the Commission under Section 7 (b) (Comm'n, p. 115). This simply is not so (see main brief, p. 72).

6. Respondents variously assert that it is Petitioners' argument that Congress had *committed* itself to the construction of Roanoke Rapids (e. g. Comm'n. p. 14; Appalachian, pp. 18, 30, 35). We have expressly stated in our main brief that Congress does not commit itself or any future Congress, but that the agencies of the Government are bound by the acts of Congress. An Act of Congress is not a contract. *Alabama* v. *United States,* 282 U. S. 502, 507.

7. The Commission imputes to the Secretary a charge that the Virginia, North Carolina and West Virginia regulatory commissions will not perform their regulatory responsibilities in the best interests of their states (Comm'n. p. 64). We made no such charge, nor have we assumed any such proposition.

8. Appalachian states (p. 22) that "petitioners argue that the words 'approved and authorized' in Section 10 of the 1944 Act are synonymous in their meaning and significance" (see also Carolina, pp. 13–15, 19). We have made it clear in our brief that the word "authorized", in this connection, is not used in the technical legislative sense of "authorization of appropriations", but in the general sense of "giving legal sanction" to a river basin plan.

9. Appalachian states (p. 28) that petitioners argued that all projects comprised in the Roanoke River Basin general plan had been authorized for construction by the Federal Government. Of course, Petitioners never made such an argument.

10. Appalachian imputes an invidious purpose to Petitioners by stating that they incorrectly paraphrased and quoted from the United States Code by omitting "the important words of limitation which show that these provisions mean something quite different." Appalachian refers to the fact that we quoted the words "flood control and allied purposes", when the statute merely mentioned "flood control".

Before Respondent accused Petitioners of such misrepresentation, it might have taken the trouble to read Sections 701a–1 and 701b, 33 U. S. C. (App. pp. 4–5) which provide that "Federal investigations of rivers and other waterways for *flood control and allied purposes* shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers." There is no misquotation or misrepresentation on our part.

At the same time, it would have been well for Appalachian to paraphrase more accurately the statement of the Chief of Engineers in H. Doc. 650 (see Appalachian, p. 47). The Chief of Engineers did not recommend, as stated by

Appalachian, that to safeguard the interests of navigation and flood control "such projects should be constructed and operated" under the direction of the Secretary of War and supervision of the Chief of Engineers. The recommendation was that such projects should be "constructed, operated *and maintained*" under the direction of the Secretary of War and supervision of the Chief of Engineers. Assuming that Appalachian were correct in its argument that these "objectives can just as easily be achieved by private construction and operation under Federal supervision", which is incorrect, the objective of *maintaining* the projects could not be so achieved.

B. CONFUSION OF ISSUES

One need only look at the "questions presented" as stated by the Commission (p. 2) and by VEPCO (p. 3) to see that Question 1, as stated by them, is not the question which we raised in our petitions for certiorari and on which the writs were granted. All parties agree that this is the main question in this case.

We presented the question whether the Government has entered upon the improvement of the Roanoke River Basin, and whether the Roanoke Rapids site has thus been withdrawn by Congress from the licensing authority of the Commission. The briefs of the Commission, VEPCO and Appalachian in combination present an entirely new

version of the same question. First, they sever Roanoke Rapids from the comprehensive plan, then they assume as a fact that Roanoke Rapids is a "straight-power" project. They raise the question whether the Federal Power Act was "repealed by implication", which we do not maintain; and they assume that the Government does not enter upon an improvement unless a project is "authorized for construction", which we submit is contrary to the statutory provisions. Obviously, the question raised by them is not the question which is presented to this Court.

Respondents refer to the Roanoke Rapids unit in the comprehensive plan of the Roanoke River Basin as a "straight-power" project. They so refer to it not once or a dozen times, but scores of times, in order to impress upon the Court that this unit could serve no purpose other than to produce power. (To the contrary, see R. 711, 749.) This is done in order to lay a foundation for the proposition that Congress "has *never* authorized a straight power project" (VEPCO, 26, also Appalachian, 42–3). From this conclusion they draw the fact that Congress has not included the Roanoke Rapids unit in the comprehensive plan as a Federal development.

We hope that the Court, in reading Respondents' briefs, will take note that it is their claim that the Roanoke Rapids unit is a "straight-power" project. We also hope that the Court

will take cognizance of the *engineering fact* that Roanoke Rapids is one of the powerhouses of the Buggs Island Reservoir and that Congress has adopted or approved the comprehensive river basin plan, including Roanoke Rapids, "for flood control and other purposes".

As to Respondents' elaborate argument, that Congress *never* authorizes "straight-power" projects or those which are not primarily for flood control, we refer to Colonel Gee's statement that the Hartwell Project recommended by him for authorization "is practically 97% power" (App. p. 131). In the Flood Control Act of 1950, Congress thus authorized appropriations for the construction of this project which was a part of the comprehensive plan for the development of the Savannah River Basin, approved in Section 10 of the Flood Control Act of 1944, "for flood control and other purposes", in the same language as Congress used in approving the comprehensive plan for the development of the Roanoke River Basin. If Respondents' argument were correct, Congress could not have authorized appropriations for the construction of this project.

If it be said that Colonel Gee's allocation of 3% of the estimated cost of the Hartwell unit to flood control takes the project out of the category of "straight-power" projects and puts it into the category of projects "primarily for flood control",

we invite attention to the fact that Congress authorized the construction, and construction is now in progress, of the Chief Joseph Project in the Columbia River Basin. In the hearings on this development before the Committee on Rivers and Harbors,[1] Colonel Feringa of the Corps of Engineers stated (p. 20):

> The plan calls for construction of a concrete gravity dam with maximum height of 220 feet and a power plant with a rated capacity of 960,000 kilowatts in 15 units, with an initial installation of 192,000 kilowatts in 3 units.
>
> The proposed Foster Creek project is essentially a power development, well suited and capable of producing at low cost a large amount of electrical energy for the needs of the Northwest area.
>
> Mr. Chairman, it is essentially just what I have said—a power dam. Certainly enthusiasts can say that you may need it for navigation because the water is used for navigation. Also the power, as Mr. Horan has stated, might be used in the shipyards. Certainly an enthusiast can say it is an irrigation project, because the power from the dam is used for irrigation, but we feel that this is a power dam, and that is what we state to this committee.
>
> The Board of Engineers for Rivers and Harbors recommends authorization, as part of the comprehensive plan for improvement

[1] Hearings on Foster Creek Dam (later named Chief Joseph Dam) held on April 29, 1946.

of the Columbia River, of construction of Foster Creek Dam and powerhouse.

The Chief of Engineers concurs in the views and recommendations of the Board.

This project was adopted and authorized in the *Rivers and Harbors Act* of July 24, 1946, 60 Stat. 634.

In the hearings on S. 517, 82nd Congress, 1st Session, a bill to redevelop Niagara Falls, the Respondent Commission, through its present Chairman, appeared and testified in favor of the Federal construction of this tremendous "straight-power" project with a potential capacity of more than 1,250,000 kw.[2]

In these circumstances, what becomes of the alleged power policy of Congress, never to authorize "straight-power" projects?

III. REPLIES TO RESPONDENTS' ARGUMENTS

There are some arguments in Respondents' briefs which should be answered: (A) Respondents' treatment of the history of flood control and power legislation in relation to federal power policy, (B) their constitutional argument, and (C) their argument on the Secretary's standing in court.

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[2] Hearings on S. 517 before a Subcommittee of the Committee on Public Works, U. S. Senate, 81st Congress, 1st Session, pp. 75–93.

A. HISTORICAL BACKGROUND

In the Appendix to our brief we have tried to present a historical background of flood control and power legislation, marshalling the facts which would throw light on the questions in this case, especially the Federal Power Policy, which we have also treated analytically.

Respondents also present what they call the "history" of this question. It is significant that in its "legislative history" VEPCO treats of the Flood Control Act of March 1, 1917 (VEPCO, pp. 31–2), but omits mention of the fact that, by this Act, the laws relating to Federal investigations and improvements of rivers and harbors were made applicable to Federal investigations and improvements for flood control on a watershed or river basin basis. The significant historical fact is that the *pattern* of legislation of the former became the *pattern* for the latter. The river and harbor acts constitute the authoritative source for ascertaining the meaning and effect of the flood control acts (App. pp. 49–54, 73–4). With this fact established, Respondents' interpretation of the Flood Control Act of 1944 becomes a nullity.

Another important historical fact omitted by VEPCO is the significance of Section 7 of the Federal Water Power Act of 1920 in the development of water resources by the United States. Furthermore, while VEPCO treats of the Public

Utility Act of 1935 (p. 40), amending the Federal Water Power Act of 1920, its legislative history omits any mention of Section 7 (b) of the Federal Power Act, involved in the present case, which contemplated more extensive water resource development by the United States and a consequent diminution of power sites available for private development (App. p. 69).

In the treatment of the Flood Control Act of 1944, and especially of the evidence presented by Colonel Goethals before the Senate Committee on Commerce (VEPCO brief, p. 51), VEPCO avoided mention of the fact that both Colonel Goethals and Senator Overton regarded the comprehensive plan for the development of the Roanoke River Basin as constituting "Federal works" (App. p. 106).

The Commission, Appalachian and Carolina also presented their treatments of legislative history. These are in the main quotations from Congressional debates, reports, and hearings, taken out of context, which at best can only serve the purpose of demonstrating that, in a given situation, a member of Congress said one thing or another about flood control development without power. They fail to include such quotations as would show that Senator Overton regarded the Roanoke River Basin plan as "Federal works", or that Chairman Whittington regarded the comprehensive plan as having been "adopted and

authorized" in the 1944 Act (App. p. 138). We included in the Appendix the hearings in full, for the reasons stated in notes 49, 51 and 59, pages 106, 111 and 127 of our main brief.

In addition, the Respondents in their historical treatment overlook the significance of the time element. Obviously, whatever may have been the testimony of Colonel Gee in 1949, it could not constitute the historical background of legislation culminating in the enactment of the Flood Control Act of 1944.

Finally, all of the Respondents attach a wholly unwarranted significance to the Act of January 21, 1927, authorizing surveys to be made of streams listed in House Document 308, 69th Congress, 1st Session. According to their historical treatment, the evolution of the Federal Power Policy then came to a halt. The Federal Power Policy, according to Respondents, is one of private commercial development as reflected in the Federal Water Power Act of 1920, supplemented by the Act of January 21, 1947, overlooking the fact that even the Federal Water Power Act of 1920 contemplated that the primary right in the development of water resources would remain in the Federal Government and overlooking, also, in large measure, the preference given by that Act to States and municipalities. Nor is any weight attached by Respondents in their briefs to the fact that Congress, after the Acts of 1920 and 1927, embarked upon Federal multiple-purpose developments on a large scale, at the same time

evolving a policy against monopolization of power and for electric service at low cost for domestic and rural use (App. pp. 67–72).

They failed to take cognizance of the fact that in 1936 Congress instituted a new policy[3], based upon the principle that it was the responsibility of the Federal Government to improve the streams for flood control and allied purposes, whenever the benefits exceed the costs (App. pp. 72–3); that the Secretary of the Army was required to make his reports responsive to this principle; that on this basis, Congress has to date approved a large number of projects, of which 146 units include power plants (App. pp. 76, 180–3); that all these projects, having been "adopted by law", are Federal undertakings and are withdrawn from the licensing authority of the Commission (App. pp. 72–76); that such was the Commission's own contemporaneous administrative interpretation of the Flood Control Acts in relation to Section 7. (b) of the Federal Power Act (App. pp. 76–79); and that in cooperation with the Army Engineers, the Commission has approved a large number of projects for Federal development (App. pp. 79–80, 186–218).

Respondents say that our treatment of federal power policy is not supported by legislation despite the fact that in our historical sketch we have

[3] The policy was expressed in 1936, though its application had begun with the TVA Act of 1933 (App. pp. 70–71).

traced the development of this policy in the Acts of Congress, and despite the fact that in our analytical treatment of the policy we refer to Section 5 of the Flood Control Act of 1944 as embodying its codification.

Respondents say that the Federal Power Policy, embodied in the Federal Water Power Act of 1920 and in House Document 308, 69th Congress, 1st Session, is one for *commercial* development of the country's water power resources (VEPCO, pp. 28, 36; Appalachian, pp. 61–2). According to Respondents, the Boulder Dam Project Act, the Tennessee Valley Authority Act, the Rural Electrification Act, the Flood Control Acts beginning with 1936, and such statutes as the Bonneville Project Act and the Fort Peck Act played no significant part in the development of the Federal Power Policy.

Appalachian, especially, stresses the importance of the development of the power resources through "private enterprise", as if the argument presented by the Secretary is directed against any private development of the water power resources.[4] While the Federal Power Policy does

[4] Within the past 4 years the Secretary of the Interior has been requested by the Federal Power Commission to report on approximately 150 applications for preliminary permits and licenses. In about 50 of them the Secretary recommended various conditions for the preservation of fish and wildlife. In some 5 instances he recommended conditions relating to the transmission of power. In about 15 cases he

contemplate Government development of water resources, it does not contemplate Government development to the exclusion of private interests. A private corporation may engage, and is by law encouraged to engage, in such developments, provided it does so with its own capital and investment and not in conflict with the plans of development adopted by the Federal Government.

VEPCO had an opportunity to obtain a license to construct and operate Roanoke Rapids under its application filed in 1929. It withdrew that application in 1935. It has now no legal or moral claim of right to develop Roanoke Rapids upon another application, filed after the Government had entered upon the comprehensive plan for the development of the Roanoke River Basin. It is not a part of our private enterprise system, after the Government has embarked upon this river basin development and has invested over $78 million in an upstream project making the down-

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made recommendations pertaining to land rights, water rights, the timing of construction, compensation to be paid to Indians, etc. In about 15 cases he recommended dismissal or denial of applications—in only 6 of these, on the ground that a proposed power development would be in conflict with projects undertaken or which should be undertaken by the United States. In all other cases he recommended the issuance of licenses to private applicants without interposing any objections or limitations. This record would hardly support Respondents' contention that the Federal Power Policy, as interpreted and applied by the Secretary of the Interior, would exclude private development of water power resources.

stream project profitable, for VEPCO to step in and take over.

What Respondents really argue is that private enterprise should undertake all water power development, profitable to them, to the exclusion of the Government. This is not a part of our private enterprise system in matters affected with a public interest. If there is any meaning in the decision of this Court in *Munn* v. *Illinois,* 94 U. S. 113, it is that private corporations engaged in businesses affected with a public interest are "public utilities", because they are engaged in a "public calling", or are performing a governmental function. It is not a part of our private enterprise system for private corporations to perform a governmental function to the exclusion of the Government itself.

The same argument as to what constitutes the Federal Power Policy reflected in Congressional enactments was recently presented before the Senate Committee on Public Works at hearings on S. 517, S. 196, and S. 2021, 82nd Congress, 1st Session, for Redevelopment of Niagara Falls. There it was contended that the Federal Power Policy was embodied in the Federal Power Act. A question arose as to what really was the "Federal Power Policy", and the following was stated by Senator McClellan, Chairman of the Subcommittee on Flood Control—Rivers and Harbors, Senate Committee on Public Works (p. 124):

> Senator McCLELLAN. May I read into the record this provision of the 1944 act to which I referred, section 5 of the 1944 Flood Control Act, which is Public Law 534, Seventy-eighth Congress, which provides, and I quote:
>
> [After reading Section 5, he continued as follows:]
>
> According to my interpretation, that is the national power policy of this Government.
>
> * * * * *
>
> Senator McCLELLAN. It is for any projects that are under the Secretary of War. The others, your reclamation projects, are under the Secretary of the Interior, but your flood-control projects and your rivers and harbors projects are all under the Secretary of War, and power generated from those projects come under this section of the act which, in my judgment, absolutely establishes the Federal power policy, whether right or wrong.

In fairness to the Commission it should be observed that the Federal Power Policy presented in its brief in this case is not the Commission's conception of the Federal Power Policy for all purposes. In No. 12, *Federal Power Commission* v. *Idaho Power Company*, the Commission in its brief (pp. 50–55) treats of the Federal Power Policy as being embodied not only in the Federal Water Power Act of 1920 and its later amendments, but also in the Boulder Canyon

Project Act of 1928, the Tennessee Valley Authority Act of 1933, the National Industrial Recovery Act of 1933, the Emergency Relief Act of 1935; the Rural Electrification Act of 1936, the Flood Control Act of 1936, the Bonneville Project Act of 1937, the Fort Peck Act of 1938, the Reclamation Project Act of 1939, and last, but not least, Section 5 of the Flood Control Act of 1944.

B. RESPONDENTS' CONSTITUTIONAL ARGUMENT

Respondents (especially Appalachian, but not the Commission) argue that to interpret Section 10 of the Flood Control Act of 1944 as including Roanoke Rapids in the comprehensive plan adopted or approved as a Federal undertaking would give rise to grave constitutional doubts. Therefore, they argue that this statute should be so interpreted as to limit the Federal undertaking to such units of the comprehensive plan as would serve the interests of navigation and flood control, but not to include "straight-power" units. They invoke the familiar rule that statutes should be so interpreted as to avoid a succession of constitutional doubts.[5] While we agree with the soundness of this rule, (1) we do not agree that it has any such application to the case at bar, but (2) to the contrary, this rule would

[5] *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422; *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, 669.

require an interpretation that these so-called "straight-power" projects are integral parts of comprehensive plans adopted by Congress "for flood control and allied purposes".

(1) It must first appear that the statutory provision, properly interpreted in accordance with its language, would on its face or in its application raise a succession of constitutional doubts. The rule of construction does not permit the creation of constitutional doubts, in order to lessen the scope or effectiveness of a statutory provision.[6] Congress "adopted" or "approved" the comprehensive plan consisting of 11 project units. Whatever may be the constitutional fate of this enactment, it cannot be interpreted as adopting or approving a different plan.

There is no merit to the proposition that Congress has no power to authorize the Government to enter upon the construction of "straight-power" projects. The constitutional test of whether Congress has the power to authorize one structure or another (be it a hydroelectric project or a steam plant) is whether there is a legiti-

[6] After quoting from *United States* v. *Jin Fuey Moy*, 241 U. S. 391, 401, to the effect that a statute should be so interpreted as to avoid grave constitutional doubts, Justice Cardozo said: "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379. See also *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315, 334–345; *United States* v. *Bennett*, 302 U. S. 299, 304; *United States* v. *Sullivan*, 302 U. S. 689, 693.

mate end for such an undertaking. By Section 10 of the Flood Control Act of 1944, Congress adopted and authorized a large number of works of improvement "for the benefit of navigation and the control of destructive flood waters and other purposes * * * in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program". If the construction of hydroelectric plants, or any other structures, bears a reasonable relation to these ends, then it is a legitimate means and is within the constitutional power of Congress.[7] This should dispose of any constitutional doubt as to the statute on its face.

Respondents attempted to show that this statute, if interpreted according to its language, would be unconstitutional in its application. Therefore they sought to lay a *factual foundation* by asking one of their witnesses whether the Roanoke Rapids unit had any relation to flood control and navigation. The witness answered that it had no relation to these purposes, and that the only purpose it would serve, other than production of power, would be *pollution control* and *preservation of fish* (R. 711, 749). Thus Respondents' attempt was thwarted by their own witness, for Congress certainly has the power to adopt means for the purpose of preventing

[7] *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

interstate streams from becoming carriers of disease. However, on cross-examination, this witness also testified that the Roanoke Rapids project was part of the comprehensive plan for the development of the Roanoke River Basin, and that the purposes of the plan were flood control, navigation, hydroelectric power and other purposes (R. 711–712, 750). There was thus no factual foundation for the proposition that the statute would be unconstitutional in its application.

(2) If Roanoke Rapids were adopted as a "straight-power" project, separate and apart from the comprehensive plan, the statute would have to be so interpreted as to bring this project within the comprehensive plan for flood control and other purposes, in order to save the constitutionality of the statute, rather than to permit it to fall. This would be the proper application of the rule invoked by Respondents.

There is no question concerning the constitutional validity of the construction of Buggs Island; there can be no question as to the right of the Government to convert the flow of the waters stored in the Buggs Island reservoir from mechanical into electrical energy; there can be no question as to the right of the Government to derive the maximum benefit from the utilization of this water flow. *Ashwander* v. *T. V. A.*, 297 U. S. 288, 330. It would be absurd to say that

the Constitution permits the utilization of this water flow through one powerhouse producing 430,000,000 kwh (at Buggs Island), but not through two powerhouses (Gaston would produce 330,000,000 kwh), or through three powerhouses (Roanoke Rapids would produce 357,700,000 kwh), which would produce a total of 1,117,000,000 kwh.

C. THE SECRETARY'S STANDING IN COURT.

1. Whether the Secretary is an aggrieved party

Again Respondents are taking full advantage of our understatement of the Secretary's case (Main Brief, p. 93). In addition to showing that Petitioner in No. 28 has substantial interests which are substantially and adversely affected by the Commission's order and, therefore, is a party "aggrieved" and entitled to judicial review, we have also stated that the Commission could not properly question the Secretary's standing, because it had recognized his interest, first, by inviting his report on VEPCO's application; second, by ordering a hearing on the questions raised by him; and finally, by admitting him as a party intervener. We thought that the second element in the concept of aggrievement, namely, the adverse effect of a decision against those interests, was a matter of course.

Respondents argue that the Commission's action in those three particulars did not constitute recog-

nition that the Secretary was "aggrieved". Assuming such to be the case, there can be no question but that the Commission did recognize that the Secretary was a party "aggrieved" by the Commission's order when it entertained his petition for rehearing. Had the Commission not recognized that the Secretary was a party aggrieved by its order, then it should have dismissed, rather than denied, his petition for rehearing.

Apparently the Commission does recognize a distinction between dismissal and denial. An apt illustration of this fact is the Commission's action on the application of the Savannah River Electric Company for a license to construct the Clark Hill project. In that case the Commission did not deny the application, but dismissed it. Assuming, however, that the difference between denial and dismissal in this case is of only technical significance, it is clear that the Commission actually recognized that the Secretary was an "aggrieved" party, when it granted his petition for rehearing in the Kings River case (*In the Matters of Fresno Irrigation District,* Project No. 1925 and *Pacific Gas and Electric Company,* Projects Nos. 175 and 1988, now pending before the United States Court of Appeals for the Ninth Circuit). The Commission could not grant a petition for rehearing without recognizing that the Secretary was a party aggrieved by the Commission's order. If the Secretary

was an aggrieved party in that case, where there was no Congressionally-approved plan, he was *a fortiori* an aggrieved party in this case.

It will be noted that the standard prescribed by Section 313 (b) for a petitioner's standing in court to review the Commission's order is exactly the same as the standard prescribed for the filing of a petition for rehearing under Section 313 (a) of the Federal Power Act, namely, that the petitioner must be a party to the proceeding and must be "aggrieved" by the Commission's order. Therefore, the Commission having recognized the Secretary as an aggrieved party, it recognized him as an aggrieved party for both purposes, and it is in an inconsistent position when it questions the Secretary's standing in court.

2. Whether the Secretary is properly represented

In addition to the questions on which the writs of certiorari were granted, VEPCO in its brief in opposition raised an additional question; namely—

> Whether the Secretary of the Interior may litigate below or here without appearance for him by an officer of the Department of Justice or an attorney specially appointed by the Attorney General.

We pointed out in our reply brief on Petition for Writ of Certiorari that this question had been raised in the court below and the objection was

overruled, and that VEPCO had not filed a cross-petition in this Court. The question raised was not properly here, because this Court will not review matters which are not included in a petition for certiorari.[8] VEPCO did not again include this as a separate question, but included it under the heading "The Standing of the Secretary to Sue" (pp. 67–70).

Both VEPCO and Carolina argue that the Secretary is not properly represented, relying on *Sutherland* v. *International Insurance Company*, 43 F. (2d) 969, and similar cases where officers of the United States were represented by "private solicitors", not by a duly-qualified Government attorney.

In the court below, the Secretary proceeded through his own counsel, with the consent of the Solicitor General, who gave his consent not as a matter of course, but because, he stated:

> Since your position on the first point of law referred to in your letter, in particular, appears to be a reasonable one, conducive to the public interest, I agree that you should be authorized to file a petition for review, despite the undesirability which we all recognize of having two Government agencies oppose each other in court. We think it advisable, however, that this Department should not take any position at this time as between the views of your

[8] *LeTulle* v. *Scofield*, 308 U. S. 415, 421–2.

Department and those of the Federal Power Commission.

In this Court, counsel for the Secretary is acting under the authorization of the Solicitor General in accordance with the practice followed in *I. C. C. et al.* v. *Inland Waterways Corporation*, 319 U. S. 671, 683; *I. C. C.* v. *Jersey City*, 322 U. S. 503, and *North Carolina* v. *United States*, 325 U. S. 507.

SUMMARY AND CONCLUSION

The briefs of the Respondents present elaborate attempts to explain away the fact that Congress by law "adopted and authorized" a project for the comprehensive development of the Roanoke River Basin through ultimate construction by the Federal Government of 11 dam and reservoir units, including development of power at all of these units, and that this plan included the Roanoke Rapids unit as one of three power plants which would utilize flood waters stored in the Buggs Island reservoir.

These briefs further attempt, by paraphrasing the language of Congress, to explain away the fact that the 1944 Flood Control Act (by which the Roanoke River Basin project was "adopted and authorized") met completely the test of Governmental undertaking as prescribed in both river and harbor and flood control legislation; namely, that the Federal Government should be "deemed to have entered upon" a project when it is "adopted by law". By an extraordinary inter-

pretation, Respondents have so rewritten and elaborated the language of the law, as to repeal by administrative action the key provisions which establish the Federal Power Policy designed to secure for the people the great values inherent in water power resources (e. g. VEPCO brief, pp. 17–20).

In the first place, they ask the Court to conclude that Congress intended that its expressed approval of the "general plan" for the Roanoke River Basin "should have no legislative effect". They suggest that, when Congress used the word "approved" as applied to the general plan, what it meant to say was:

> We find the general plan to be, as the Chief Engineer has recommended, "the best plan for the development of the * * * Roanoke River Basin" (I, 136) and accordingly we authorize these two projects in the plan that offer substantial provision for flood control although we refuse to authorize the straight power projects since we do not think them a suitable purpose for public funds (VEPCO, pp. 17–18).

Further injecting words for which no justification can be found in the actual language of the Act, VEPCO states that in approving the plan Congress meant to include in the Act some such words as the following:

> Such approval merely expresses our judgment to serve as a guide in all future consideration, whether by the Congress in

> passing on any future requests or by the Commission in any license proceedings that may be instituted affecting the Roanoke River (VEPCO, p. 18).

By thus injecting into the simple language used by Congress, to approve the Roanoke River Basin project, new concepts not found anywhere in the evolution of flood control legislation, Respondents attempt to provide a foundation for the Commission's action in issuing a license purporting to turn over to a private company the development of one of the principal power units in an over-all basin plan which Congress has adopted and approved.

VEPCO attempts further to implement its revision of the law by asserting that Congress "divided the general plan into two parts when it authorized the flood control projects but refused to authorize the straight power projects" (VEPCO, p. 27); and again, that Congress "made its choice to authorize the multipurpose dams at Buggs Island and Philpott but to exclude from Federal authorization the straight power projects in the rest of the plan" (VEPCO, p. 61).

Of course, there is no such division to be found in the law, which is the only true evidence of what Congress actually did. A more valid theory of the authorization of Buggs Island and Philpott, as the first step in carrying out the general plan, is to be found in the technical desirability of constructing the conservation storage reservoir

in advance of the generating capacity dependent on such storage for its full use.

As shown elsewhere in our brief, the very rationalization on which this imaginary revision of Congressional action rests, i. e., that Congress has never authorized a "straight-power" project, is based on an error of fact (see pp. 8–10, *supra*).

It is just this rewriting of Section 10 of the 1944 Flood Control Act which the Commission's brief attempts to support when it asserts that the Chief of Engineers, in line with his prior practice, recommended a general plan for the Roanoke River development, "but did not directly nor by any possible inference recommend that Congress preclude non-Federal development under the Federal Power Act of the named sites in accordance with the general plan, except that Buggs Island and Philpott sites where Federal construction was considered desirable" (Comm'n, p. 8).

In a parallel effort to bulwark their revision of the law, VEPCO asserts that "the engineering report in which the Commission concurs (House Doc. 650, I 135) is not a recommendation that the Congress renounce its policy against construction of straight power projects by public funds" (VEPCO, p. 63).

It need hardly be pointed out that, in recommending a Federal program to be taken up on a step-by-step basis in accordance with the regular procedure for authorization of appropriations for the constituent units, the Chief of Engineers could

hardly have been expected to inject a recommendation that non-Federal development of any of such units be precluded.

When, still further injecting hidden meanings into the engineering report, VEPCO suggests that "to show the greatest practicable development, the report speaks in terms of Federal development, so that estimated costs may omit any provision for taxes, may omit any provision for insurance costs and may include a provision for interest of only 3%" (VEPCO, pp. 63–4), it is clearly imputing to the Chief of Engineers and Congress a readiness to mislead the public, unless the report was intended to recommend a Federal development.

Respondents' emendation of the law enacted by Congress, as well as of the report of the Chief of Engineers on which it is based, would secure by non-legislative process a change in provisions which they do not like.

Respondents further attempt by administrative action to render nugatory a Congressional policy which the private power companies had been unable, through the most vigorous activities, to persuade Congress to modify or repeal. For here the Commission justifies the issuance of a license for private development of the Roanoke Rapids site by openly substituting its marketing theory for the marketing principle which has been established by Congress and has been made the direct responsibility of the Secretary of the Interior (Comm'n, p. 9).

Thus, in direct contradiction of the principles established in Section 5 of the 1944 Flood Control Act, the Commission asserts that in the present instance "the water power resources available at the Roanoke Rapids site can be most effectively utilized if the power generated thereby is distributed through a large utility system." It continues (p. 9):

> The preference customer market for which the petitioners desire to reserve this site cannot for many years provide the volume of power demand which is essential for full utilization of these water power resources.

This position is amplified in pages 65 to 67 of the Commission's brief, where it minimizes the preference loads available in the area, saying (p. 67):

> These circumstances being established, it would hardly appear economically desirable to reserve the Roanoke Rapids site to serve preference customers in this area, especially when it is considered that such a small percentage of the consumers in that area would ultimately be benefited under the policies here suggested by petitioners.

It may be noted in passing that the Commission is here presuming to make decisions which are clearly reserved for the Secretary of the Interior under Section 5 of the 1944 Flood Control Act. But, in doing so, it is inadvertently recognizing that such decisions by the responsible

marketing agent must be made well in advance of major decisions as to authorizations of the project. This supports the contention of Petitioners as to the vital interest of the Secretary in this case.

Thus, Respondents clearly indicate that the substantive basis for the Commission's action lies in their disagreement with Congress as to what use of the Roanoke Rapids site would best serve the public interest. Specifically, they assert that Congress was in error when it provided that power from such water power resources should be marketed by the Secretary of the Interior in accordance with the standards of Section 5 of the 1944 Act, including the preference given to public bodies and cooperatives. Rather, they say, this kind of power can be most advantageously used in a large utility system where it can be combined with power from many steam plants in such a way as to justify the installation to the maximum capacity.

This represents an attempt to make effective bus-bar sales to local utilities, a proposition rejected by Congress, when on November 24, 1944, it voted down the Bailey Amendment to Section 5 (90 Cong. Rec. 8368–9).[9]

Respondents' briefs thus make it clear that the entire scheme, for the licensing of Roanoke Rapids to the local private power company, is directed at decimating a Congressionally-approved river basin program and undermining a

[9] *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96.

Federal power policy established by Congress.

In answer to the Commission's contention (Comm'n, pp. 80–3) that the tardy expansion of hydroelectric development under license is due to the fact that the bulk of such resources is located in the hitherto undeveloped parts of the country, it may be observed that VEPCO has been serving one of the old and reasonably well developed parts of the country for many years. It has built its total power supply up to over 700,000 kilowatts with an annual energy output in excess of 3 billion kilowatt hours. The hydroelectric resources of the Roanoke River Basin have been within its reach throughout that period. Since 1920, the opportunity for securing a license for one or more of the Roanoke River resources has been available.

Yet, down to the time when Congress actually authorized the step-by-step development of the Roanoke River Basin for flood control and other purposes, opening the way for rural electric cooperatives and municipal plants in the area to obtain low-cost power supply under the Federal Power Policy, VEPCO had developed only 10,000 kilowatts of dependable hydroelectric power, out of its total of over 700,000 kilowatts of generating capacity (Comm'n, p. 74).

Respondents now claim that the issuance of the license to VEPCO for a key project in the Federal plan, taking advantage of Federal flood

storage, is a matter of urgent necessity in the public interest.

Respondents' briefs are all the proof required for the proposition that the whole effort to justify the issuance of a license for the Roanoke Rapids project is but a bald attempt to set the Commission above Congress in the matter of decisions as to the use of the water resources over which Congress has jurisdiction.

In effect, the Commission and the companies say in chorus that Congress has given the Commission the broad discretion to correct or to reverse Congress in the determination of basic decisions on matters of power policy. We submit that the Commission is the agent of Congress, and that the Federal Power Act must be administered in such a way as to uphold the integrity of all the Acts of Congress.

Respectfully submitted.

GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the Relation of Oscar L. Chapman, Secretary of the Interior.

OCTOBER 22, 1952.

The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel.

ROBERT L. STERN,
Acting Solicitor General.

APPENDIX

Respondents' Arguments and Replies Thereto in Petitioners' Main Brief

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